

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MARTIN'S SUPER MARKETS

and

Case 25--CA--22900

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 700, a/w
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC

Steve Robles, Esq.

(Indianapolis, Indiana) for the
General Counsel.

John S. Schauer, Esq.

(Seyfarth, Shaw, Fairweather &
Geraldson, Chicago, Illinois) for
the Respondent.

DECISION

I. Statement of the Case

1. JERRY M. HERMELE, Administrative Law Judge. The sole issue in this case is whether one supermarket store unlawfully prohibited a union's distribution of anti-company handbills to the general public. The Union filed its charge on November 23, 1993, alleging discriminatory refusal to permit handbilling and the General Counsel issued its complaint on December 9, 1994, which was answered by the Respondent on December 19, 1994. After numerous continuances, and one indefinite postponement, a short two-hour hearing was held in South Bend, Indiana, on July 14, 1997, at which the General Counsel called two witnesses and the Respondent called one. The Respondent submitted no written evidence. Both parties then filed briefs on August 15, 1997.

II. Findings of Fact

2. Martin's Supermarkets (Martin's) is a chain of 16 nonunion grocery stores in northern Indiana, headquartered in South Bend (Tr. 13, 67). For the year before November 1, 1993, Martin's purchased and received interstate goods valued over \$50,000, and derived gross revenues over \$500,000 (G.C. Ex. 1(c)). Martin's competes with Kroger, a union supermarket (Tr.

14, 56). One of the Martin's stores is the "Ironwood store," which is located at the corner of Ironwood Road and State Road 23 in South Bend (Tr. 13). The Ironwood store is surrounded by other retail stores, and all of them share a parking lot with two easements thereon for traffic to enter or exit from Ironwood Road and State Road 23 (G.C. Ex. 2). Martin's leases the property on which the Ironwood store is located, and as such has the authority to establish and enforce no-solicitation and no-distribution policies (G.C. Ex. 5). This authority extends to the sidewalks in front of the store and the parking lot adjacent to the store (Tr. 14).

3. Douglas Gaerte has been the manager of the Ironwood store since its opening in 1991. Initially, he had the authority to approve or deny requests by small groups seeking to solicit or distribute at the store (Tr. 31). Then, on July 1, 1993, Martin's issued a written policy generally prohibiting solicitation and distribution (G.C. Ex. 3; Tr. 14). However, they still allowed "limited access by certain solicitation of and distribution to customers by charitable organizations," provided that:

- A. The organizations must have authorization from the Martin's Main Office.
- B. The organization must be charitable in nature and must be either locally based or the original affiliate of a larger organization.
- C. The organization must not take public positions on any significant issue over which there are differing opinions in the community.
- D. The organization must not be directly involved in political issues.
- E. The number of solicitors/distributors must be limited to one organization at any one time.
- F. The length of time that the solicitors/distributors are permitted access to our premises is limited to one day and approved hours or as authorized by the main office.
- G. The location of the solicitors/distributors will be at the discretion of the store manager.
- H. The organization must not solicit customers not to patronize or purchase goods sold at Martin's.

I. The organization must not utilize placards.

J. The solicitors/distributors must not litter,
play radios, etc. at a loud volume or otherwise
disrupt store operations in any way.

Finally, each such applicant had to certify in writing that the above conditions would be met (G.C. Ex. 4).

4. Just before July 1, 1993, two groups seeking to solicit at the Ironwood store obtained permission to do so. First, the St. Hedwig Church had two people selling raffle tickets on July 10, 1993, from 10 a.m. to 2 p.m. Second, one or two people from the Clay High School band sold raffle tickets on July 17, 1993, from 10 a.m. to 2 p.m. (Tr. 15). After July 1, 1993, Respondent granted approval to two groups: the Knights of Columbus distributed lollipops, on November 19 and 20, from 10 a.m. to 4 p.m., to raise money for the Big Brothers and Sisters (G.C. Ex. 13); and the Salvation Army placed one bellringer near the Ironwood store during the Christmas season of 1993. All four of the aforementioned groups signed Respondent's written form seeking approval. But the Salvation Army bellringer on December 24, 1993, was the last such approved solicitation at the Ironwood store (Tr. 16-17, 70).

5. At 10 a.m. on November 17, 1993, six or seven members of Local 700 of the United Food and Commercial Workers Union (the Union) appeared at the entrance of the Ironwood store and started handbilling, without prior approval (Tr. 45-49). The handbills stated that:

This store is non-union.
Please do not patronize.
Please shop union stores.

The reverse side of the handbills requested customers to shop at the area's several Kroger stores, which are union (G.C. Exs. 7-8). Gaerte and another store supervisor, Randy Holtzinger, went out to ask the handbillers to leave. When they refused, either Gaerte or Holtzinger called the police, at which point the handbillers departed from the store entrance (Tr. 36-37). However, after talking with the police, they moved to the two easements on the parking lot to continue their handbilling for a few hours. There were few handbills distributed at the easements, though, because of little pedestrian traffic, and the fact that most of the car windows were rolled up due to the cold weather (Tr. 50). There is a stop sign at both of the easements and it is common for several cars to line up at each easement in order to exit the parking lot (Tr. 43-44). The Union handbillers returned to the customer entrance of the Ironwood store the next day, November 18, and the same sequence of events ensued: the

police were called, and the handbillers moved to the parking lot easements (Tr. 51-52). According to one of the Union handbillers, Scott Barnett, the move from the store entrance to the easements resulted in a one-third reduction in the number of handbills distributed (Tr. 53).

6. The Union changed tactics on November 19, from handbilling to picketing, at the two parking lot easements. The picketing proceeded daily except for bad weather and holidays (Tr. 54-55). The purpose of the picketing was to communicate the fact that Martin's was nonunion and that Kroger's was union; at no time did the Union seek to organize or represent the Martin's employees (Tr. 56). Nobody from Martin's interfered with the picketing (Tr. 41). Then, just one week later, on November 24, 1993, Respondent allowed a local radio station van to park about 50 feet away from the store entrance. The station then broadcast from the van but did not solicit any customers or distribute any materials (Tr. 33). And, as discussed supra, the Salvation Army bellringer was stationed near the store entrance until December 24, 1993 (Tr. 40, 54). In view of these other events, James Jacobs, the president of the local union, sent a letter to Holtzinger on December 9, 1993, requesting permission to solicit on the sidewalk in front of the store. Jacobs requested a reply to his letter by December 13, but none was received (G.C. Ex. 6).

7. The picketing lasted for about six months, through the spring of 1994, and Barnett characterized it as effective "to some degree." The union picketers were able to handbill as well at the easements, to people walking into or out of the parking lot (Tr. 59). Generally, there were three picketers at each easement (Tr. 60-65). After the picketing ended, the Union continued its campaign against Martin's, by handbilling at other union organized facilities in the South Bend area and generally speaking out (Tr. 57).

8. After 1993, Gaerte asked several individuals seeking to solicit in front of the Ironwood store to leave, such as children selling candy (Tr. 42). And as already mentioned, Respondent has not approved any solicitation or distribution since Christmas Eve of 1993 (Tr. 41-42). Then, on March 8, 1996, Martin's issued a new policy prohibiting all solicitation or distribution (G.C. Ex. 10). So, thereafter, even the lollipop distributors and Salvation Army were denied permission to solicit (G.C. Exs. 11-12).

III. Analysis

9. This case presents yet another foray into the subject of what nonemployee union agents seeking to communicate with the general public may do on private property. The starting point for this well worn trail is NLRB v. Babcock & Wilcox Co., 351

U.S. 105 (1956), which held that employers may bar the distribution of union literature by nonemployee organizers on their private property if both of the following tests are met: (1) "accessibility"--other channels of communications exist for the Union to reach the targeted employees (e.g., available public property); and (2) "no disparate treatment"--the employer's antisolicitation policy does not discriminate against the Union by allowing other entities to solicit and/or distribute. But the burden is still on the Union to show that one of these two factors is not present in order to gain access to the private property. Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978). Thus, if a union fails to establish either factor, no unfair labor practice lies against an employer who bars union organizers from its property. Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

10. Here, we are dealing with a union seeking to communicate with the general public patronizing Respondent's store, as opposed to an effort to organize Respondent's employees. Still, the Babcock test seems to apply. Thus, because there has been no showing in this case on the accessibility exception, the General Counsel has placed all its eggs in the disparate treatment basket. To summarize the case law on this point, an employer may not prohibit a union from picketing and handbilling near its customer door where it also allows "virtually unlimited use of its property to outsiders for sale, solicitations, and distributions. . . ." D'Alessandro's Inc., 292 NLRB 81, 84 (1989). Nor can employers engage in this type of disparate treatment where there is "extensive use of the facilities by charitable, civic, and other organizations. . . ." Ordman's Park & Shop, 292 NLRB 953, 955 (1989). Thus, employers cannot even open their property to noncontroversial solicitation, such as from charities, if they also bar unions. However, an employer may permit "a small number of isolated 'beneficent acts'" on its property and not run afoul of Section 8(a)(1) of the Act. Hammary Mfg. Corp., 265 NLRB 57 (1982).

11. But the Hammary exception has apparently not been applied yet to condone small scale disparate treatment. Rather, in the 1990s, the Board concluded that only 23 days in one year of civic and charitable solicitation activity at two supermarket stores, not even counting a December bellringing by the Salvation Army, was discriminatory where union handbilling and picketing were banned in front of the same store entrances. Riesbeck Food Markets, 315 NLRB 940 (1994). Likewise, prohibited disparate treatment was also found against a grocery store chain where Muslims were allowed to sell oil on a "pretty constant basis" in front of one store and on a "regular" basis at a second store, Jehovah's Witnesses and the Lions Club solicited or distributed at a third store "occasionally," political literature was handed out a few times at a fourth and fifth store, and the Girl Scouts

solicited occasionally at the first and sixth stores. Be-Lo Stores, 318 NLRB 1 (1995), reversed in part and affirmed in part, Be-Lo Stores v. NLRB, No. 96-1575 (4th Cir. September 16, 1997). But, it was recognized in Riesbeck that "de minimus [sic] or isolated toleration of nonunion activity will not ordinarily support a violation." 315 NLRB at 949.

12. Turning to the facts of this case, it is concluded that the disparate treatment afforded by Martin's at its Ironwood store between union and civic/charitable groups falls within the Hammary exception and thus does not violate the Act. At the outset, it is concluded that the relevant period for determining disparate treatment is after July 1993. In this regard, on July 1, 1993, Respondent replaced its policy of giving the Ironwood store manager broad discretion to approve or disapprove solicitation with a written policy generally prohibiting solicitation and distribution, except for limited charitable groups under limited circumstances. Thus, it is the application of this July 1, 1993 policy that is the focus of this case. Although a church group and a high school band were both allowed to sell raffle tickets, on July 10 and 17, 1993, respectively, it is significant that both of these groups asked for permission before the July 1, 1993, Martin's policy became effective. In allowing both solicitations, Martin's was merely effectuating the last of the pending requests under its old policy. Thus, the analysis of the July 1, 1993 policy should exclude these two solicitations.

13. As for the solicitations approved pursuant to this new policy, there are only two: the Knights of Columbus lollipop distribution for six hours a day on two days--November 19 and 20, 1993--and the December 1993 bellringing by the Salvation Army. Of course, at this time in late 1993 the Union was barred on two occasions from handbilling at the same location: the customer entrance to the Ironwood store. But Respondent did allow handbilling, and later picketing, out at the parking lot entrances. As for the radio station van parked in front of the store on November 24, 1993, it is concluded that this did not constitute a third approved solicitation. Rather, the evidence clearly shows that this was a joint radio station--Martin's promotional event as opposed to a solicitation or distribution covered by the July 1, 1993 policy. Finally, it is clear that no more exceptions were allowed by Respondent after Christmas Eve 1993. Indeed, urchins seeking to sell candy were shooed away after this date and the revised policy prohibiting all solicitations went into effect on March 8, 1996.

14. So, the question in this case boils down to whether two civic/charitable exceptions to the Martin's July 1, 1993 anti-solicitation/distribution policy, at only one of over a dozen supermarket stores, constitute impermissibly disparate treatment

where union handbillers were barred from the same customer entrance of the store. The Presiding Judge thinks not. First, it is arguable that the Knights of Columbus lollipop distributors were the only "discriminatory" exception to the no-solicitation/no-distribution rule, as the Board has an obvious warm spot (as we all do) for innocuous holiday decorations such as Salvation Army bellringers. See e.g., Sentry Markets, 296 NLRB 40, 42 (1989) ("the limited presence of the Salvation Army on the Respondent's premises during the holiday season does not significantly diminish the strength of the property right asserted"). Second, the attempted union handbilling and Knights of Columbus/Salvation Army solicitations did not occur on the same days, thus marginally diminishing the appearance of disparate treatment. Third, both of the two exceptions were highly circumscribed. Specifically, as compared to six union handbillers converging on the Ironwood store entrance, the Salvation Army bellringer was alone and the Knights of Columbus lollipop distributors stayed for a grand total of 12 hours over two consecutive days. Fourth, the record reveals only one of the dozen-plus Martin's stores allowing solicitations after July 1, 1993. In sum, the facts of this case constitute a de minimis toleration of nonunion solicitation by Martin's after July 1, 1993. Thus, it cannot be said that Respondent created a limited public forum at its Ironwood store which resulted in the improper banning of union handbillers on November 17-18, 1993.

IV. Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(a)(1) of the Act in enforcing its no-solicitation/no-distribution rule against the Union on November 17-18, 1993.

ORDER

Accordingly, IT IS ORDERED that the General Counsel's December 9, 1994 Complaint IS DISMISSED.¹

¹ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Dated, Washington, D.C. October 30, 1997

Jerry M. Hermele
Administrative Law Judge

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